

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 244

LIONEL G. OTT, Commissioner of Public Finance and
Ex-officio City Treasurer of the City of New Orleans,
Et Al.,

Appellants,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION.

Appeal from the United States Circuit Court of Appeals
for the Fifth Circuit.

REPLY BRIEF OF APPELLANTS TO SUPPLEMENTAL
BRIEF OF APPELLEES.

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MAY IT PLEASE THE COURT:

AS TO THE JURISDICTION.

Appellees, at the Bar, asked for additional time to file another brief, but we find such supplemental brief to be simply repetitious of their previous argument.

Here again their analysis of the Court of Appeals decision and the effect thereof, is erroneous.

Reduced to its simplest terms, what the Court of Appeals said was that unless *all* of this watercraft was in Louisiana *at all times*, the State had no power to tax. Thus, that Court completely disregarded the tax apportionment principles upheld in so many cases for over half a century by this Court. And, in so doing they held the Louisiana tax apportionment statute unconstitutional.

Obviously, if Louisiana could only tax this watercraft if it was always in the State and only in that State, it would tax one hundred per cent of the property for it would have sole dominion over the entire property which could be taxed under the general tax laws of the State, the same as real estate, etc. A tax apportionment statute would be unnecessary.

But this Statute was designed to meet the exact situation as in the cases at Bar, and to provide a constitutional method of taxation in line with the principles laid down by this Court as to integrated *systems* of interstate transportation.

The Louisiana Statute specifically provides for the taxation of this portion of the fungible units of these inland water lines and when the Circuit Court of Appeals, as the basis for their decision, says that "this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways" [R. p. 112 (fol. 376)] they then, in effect, held this Louisiana Statute

repugnant to the Constitution of the United States. For the Circuit Court of Appeals decision to stand, would mean that Louisiana could never tax inland water carriers on the proportionate rule basis.

Under the Court of Appeals decision, *if it were admitted* that a daily average portion of this watercraft was in Louisiana throughout the year, the Court would have held "no taxing situs" because "this principle of apportionment has never been applied to watercraft using navigable inland waterways" and the exaction of taxes thereon violates the "due process of law" clause of the Constitution of the United States. Plainly, then, the present decision drains the life-blood from this Louisiana Statute and holds it repugnant to the provisions of the Constitution of the United States, for the very wording of the Statute calls for the application of the "principle of apportionment to watercraft using navigable inland waterways".

Could the effect of the decision be more plain?

Appellees likewise assert on page 6 of their original brief that the Statute is unconstitutional!

Appellees further admit on page 2 of their supplemental brief:

"The Court held that the taxes could not be exacted without violating the 'due process clause' because the property taxed had no taxing situs in Louisiana."

To hold such, is to declare the Statute unconstitutional! The lower Court held that to have a "taxing situs" *all* of the property must be *always* in Louisiana. This is to deny the tax apportionment principles which this Court has so clearly and positively enunciated over so many years.

Thus, appellees, in their argument, cannot or will not see the effect of the Court of Appeals decision. But it is clearly apparent for those who will see!

Appellees, in their confusion or distortion, insist on trying to inject the *DeBardeleben* case into this issue—the complete facts in that case being absolutely *dehors* this record. Again, in clarification, the decisions (68 Fed. Sup. 30—166 Fed. 2nd 509) show that as a matter of fact, *all* of DeBardeleben's (Coyle Lines) watercraft was found to be permanently in Louisiana, and this special tax apportionment Statute *did not apply*.

Regardless, therefore, of any erroneous interpretation appellees may seek to put upon the Court of Appeals decision, it speaks for itself.

Clearly, then, this Court has jurisdiction to determine these constitutional issues and the important Federal questions presented!

AS TO THE FACTS.

Here again, appellants are going to let the record speak for itself.

In line with the jurisprudence of this Court (as quoted in other original brief) for Louisiana to tax under its Statute, EITHER of two factual situations should exist; viz: a string of barges daily passing from one end of the State to the other, OR an average portion of this watercraft daily in Louisiana, throughout the year.

The record shows BOTH of these situations exist in the instant cases. In order for each of these Lines to average a tow to New Orleans once a week or oftener, there must necessarily be a long tow coming down the Mississippi River in Louisiana, while another is going up the River in Louisiana, thus passing each other in Louisiana. Because of their slow mode of travel, the down-bound tow and the up-bound tow must be traversing the several hundred miles of Mississippi River in Louisiana daily in order to make this average arrival at destination in New Orleans.

When each Line arrives in New Orleans, the towboat leaves all its barges there and then takes its other barges, which, had been waiting in New Orleans, on the up-bound tow and this process is repeated day in and day out, week in and week out, throughout the taxing year. Obviously, then, there is always an average portion of this watercraft daily in Louisiana, throughout the taxing year.

Appellees seek to point out the "time" spent by individual towboats in Louisiana as well as the "percentage of time"

spent by certain of this watercraft. Appellants could likewise point out in the record [R. pp. 69, 70 (fol. 311)] that certain *barges* spent months at a time in Louisiana without leaving. But this is not the important point in these cases. The decisive fact to consider is that these *Lines* are operating *daily* in Louisiana with an average portion of the watercraft daily in the State throughout the year.

Significantly, appellees only produced the time charts and graphs of their *owned* equipment, but not of their *leased* equipment used in their *lines*. Each line uses a great deal of leased watercraft [R. p. 61, (fol. 284)—R. p. 67 (fol. 308)—R. p. 71, (fol. 313)] and the Louisiana Statute specifically covers such leased equipment:

“(a) . . . All movable, and regularly moved . . . craft, barges, boats and similar things . . . either owned or leased for a definite and specific term stated and operated (such, illustratively, but not exclusively as . . . boats, barges and other watercraft and floating equipment of water transportation lines . . .)” (Act 59 of 1944 of the Legislature of Louisiana.)

Had appellees produced the graphs and charts also of their *leased* watercraft to show “percentage of time” in Louisiana, this Court could very readily see that the “percentage of time” of all this watercraft in Louisiana was larger than in any other State. New Orleans is the largest port on their Lines, and the place where their greatest volume of cargo is handled. (R. pp. 61, 65, 66, 69.)

But the "time" spent, as such, has never been the measure of apportionment, when tax apportionment has been levied upon the proportionate *mileage* basis, upheld so many times by this Court.

Mathematical exactitude has never been a constitutional requirement, and more especially in the instant cases when the record discloses that not one of appellees pays one cent of ad valorem taxes *anywhere* on this watercraft. [American—R. p. 62 (fol. 284)—Mississippi Valley—R. p. 65 (fol. 305)—Union—R. p. 73 (fol. 316).]

It is not at all necessary, however, to *consider* the *detailed* movement of a particular towboat or barge, when *each Line* admits its tows arrive in New Orleans, once a week or oftener, throughout the year. These are undisputed facts adduced from appellees themselves!

Contrary to what appellees believe the record discloses, each Line admits it runs on regular schedule to and from New Orleans and the northern termini—the American on regular schedule between Pittsburgh and New Orleans [R. p. 60 (fol. 282)]—the Mississippi Valley on regular schedule between Cincinnati and New Orleans [R. p. 69 (fol. 310)] and the Union on regular schedule between Pittsburgh and New Orleans [R. p. 71 (fol. 313)].

It makes no Constitutional difference that some particular towboat or barge was seldom in Louisiana or perhaps not at all. The Constitutional basis for the taxation is that these Lines are daily running in and out of Louisiana and an average portion of their equipment per-

manently within the State—not necessarily the same boat or barge—but a portion of fungible units of an integrated system of transportation.

Nor does it make any difference that one port may be on one side of a stream and a second port on the other. The route is fixed between the banks, of inland streams, and the route is as fixed and determined as it possibly could be. There is much more divergence in a railroad's operations, with its scores of switch-tracks to the sites of industrial plants, etc. Yet, for proportionate assessment purposes, the mileage is simply taken from the point where the railroad enters the State to its terminus within the State, or where it leaves the State.

This is exactly what the Statute calls for in the instant cases and the basis on which the assessments were made:

... "1. The portion of all of such property, of such person, firm or corporation shall be assessed in the State of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the state bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation." . . .
(Act 59 of 1944 of the Legislature of Louisiana.)

AS TO THE METHOD OF TAXATION.

This issue is not before the Court, for, as appellees are forced to admit, there are ample administrative remedies in Louisiana law to correct an erroneous or excessive method of assessment.

The agreed stipulation on pages 33 and 34 of the record (by which appellees are bound) is destructive of appellees' criticism of the method of assessment.

And as Mr. Justice Douglas said in *Butler Bros. v. McColgan*, 315 U. S. 501, 86 L. Ed. 993:

"One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed."

CONCLUSION.

The positive, admitted facts show the operations of these Lines in Louisiana to clearly come within the constitutional provisions, as laid down by this Court, to enable this State to collect its proportion of taxes.

The Louisiana Statute is therefore Constitutional and we respectfully pray that the judgments in these nine cases be reversed, and that judgment be entered in favor of appellants herein.

Respectfully submitted,

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This is to certify that copies of this brief have been served on opposing counsel on this the day of January, 1949.

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